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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. [redacted] 25

HONORABLE JULIUS J. HOFFMAN, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,

Petitioner,

vs.

JOHN F. BLASKI, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on October 16, 1958.

OPINIONS BELOW.

The opinion of the District Court (App. p. 1a) was not reported. The opinions announced by the Court of Appeals on July 1, 1958 (App. p. 14a) and October 16, 1958 (App. p. 15a) have not been reported as of this date.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was made and entered on October 16, 1958 (App. p. 33a). A petition for rehearing *in banc* was filed on October 23, 1958, and was denied on November 25, 1958 (App. p. 35a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

28 U. S. C. § 1404(a) confers authority on a United States District Court to transfer a civil action to any other district "* * * where it might have been brought." If the transfer of an action would serve the convenience of parties and witnesses and would be in the interest of justice, does 28 U. S. C. § 1404(a) confer upon a United States District Court statutory authority to transfer an action, upon motion of all defendants, to another United States District Court having jurisdiction of the subject matter, but located in a district in which venue and jurisdiction over the person would be improper if the action had been instituted there and the defendants had duly objected?

STATUTE INVOLVED.

This case involves 28 U. S. C. § 1404(a), 62 Stat. 937 (1948) which provides as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE

On March 1, 1957, the respondents filed suit in the United States District Court for the Northern District of Texas. It was alleged that respondents' patent had been infringed by R. P. Howell, Jr., a resident of Texas and Lifetime Metal Building Company, a Texas corporation not doing business in Illinois. Pursuant to 28 U. S. C. § 1404(a), the defendants moved to transfer the case to the United States District Court for the Northern District of Illinois because two other cases involving the same patent were pending in that court and because numerous witnesses resided in that district. The defendants expressly waived their objection to venue and personal jurisdiction. The Texas court determined that the transfer would serve the convenience of the parties and witnesses and that it would be in the interest of justice. Accordingly, the Texas court, in the exercise of its discretion, ordered the action transferred.

The respondents then sought a writ of mandamus in the United States Court of Appeals for the Fifth Circuit. The sole argument made by the respondents was that the Northern District of Illinois was not a district where the action "might have been brought" within the meaning of 28 U. S. C. § 1404(a), and that the Texas court lacked authority to transfer the action. However, the United States Court of Appeals for the Fifth Circuit held that the transfer was within the provisions of 28 U. S. C. § 1404(a) and denied the respondents' motion for leave to file a petition for a writ of mandamus. *Ex Parte Blaski*, 245 F. 2d 737 (5th Cir. 1957), cert. denied, 355 U. S. 872 (1957).

The action was transferred to the United States District Court for the Northern District of Illinois and was assigned to the calendar of the petitioner. Thereupon, the respondents moved the petitioner to return the action to

Texas solely on the grounds that the Texas court lacked authority to transfer it and that the Illinois court lacked authority to accept it. The petitioner did not deem himself bound by the decision of the Fifth Circuit. Instead, he considered the question of jurisdiction *de novo* and, in an oral opinion (App. p. 1a), denied the respondents' motion. The respondents then petitioned the United States Court of Appeals for the Seventh Circuit for a writ of mandamus to compel the return of the action to Texas. Again, the respondents contended that the Northern District of Illinois was not a district where the action "might have been brought" and that the Texas court lacked statutory authority to transfer the action. In addition, the respondents contended that the Illinois court lacked jurisdiction to accept the transferred action. However, the respondents' petition was denied on July 1, 1958. The respondents then petitioned for a rehearing. The petition was granted, and, without re-argument, the original judgment was vacated and the writ of mandamus was issued on October 16, 1958, one judge dissenting (App. p. 15a). The court held that:

> "If when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant, it is a district 'where it might have been brought.' If he does not have that right, independently of the wishes of defendant, it is not a district 'where it might have been brought,' and it is immaterial that the defendant subsequently acquiesces." (App. p. 21a.)

The petitioner then moved for a rehearing *in banc*, but the motion was denied on November 25, 1958, two judges dissenting (App. p. 35a).

It may be noted that the identical issues involved herein are presented in the case of *Behimer et al.* v. *Sullivan, U. S. District Judge*, Appeal No. 12356, C. A. 7, not yet

officially reported. We are assured by counsel that a petition for writ of certiorari in that case will be filed within a few days.

REASONS FOR GRANTING THE WRIT.

The writ of certiorari should be granted for the following reasons: (1) The United States Court of Appeals for the Seventh Circuit has rendered a decision in conflict with the decisions of four other courts of appeals on the same matter; (2) The United States Court of Appeals for the Seventh Circuit has rendered a decision which is in conflict with the decision of another court of appeals *in the same case;* (3) The United States Court of Appeals for the Seventh Circuit has erroneously decided an important question of federal law which has not been, but should be, settled by this Court to effect the orderly administration of justice.

(1) The United States Court of Appeals for the Seventh Circuit has rendered a decision in conflict with the decisions of four other courts of appeals on the same matter: *Ex Parte Blaski*, 245 F. 2d 737 (5th Cir. 1957), cert. denied, 355 U. S. 872 (1957); *Torres* v. *Walsh*, 221 F. 2d 319 (2d Cir. 1955), cert. denied, 350 U. S. 836 (1955); *In Re Josephson*, 218 F. 2d 174 (1st Cir. 1954); *Anthony* v. *Kaufman*, 193 F. 2d 85 (2d Cir. 1951), cert. denied, 342 U. S. 955 (1952); and *Paramount Pictures Inc.* v. *Rodney*, 186 F. 2d 111 (3rd Cir. 1951), cert. denied, 340 U. S. 953 (1951). In the instant case, the court expressly recognized that a conflict existed:

> "Notwithstanding that some points of distinction may be drawn between the cited cases (except *Blaski*) and the instant case, it is fair to state that all of these cases contain language which in one way or another supports the power of the Texas Court in the instant matter." (App. p. 23a.)

The *Blaski* case, *supra*, has already been discussed. In the *Torres* case, *supra*, the court affirmed the transfer of an admiralty action from New York to Puerto Rico. The court noted that it was the respondent who sought the transfer; that there was no problem as to venue because the respondent agreed to appear in Puerto Rico; and that, consequently, the District of Puerto Rico was a district in which the action "might have been brought." The *Josephson* case, *supra*, involved a shareholder's derivative action which was instituted in Massachusetts and, on motion of the defendants, was transferred to New Mexico where venue was proper, but where service of process could not be had. However, the defendants agreed to appear in New Mexico. In upholding the transfer, the court stated that the transferee district was one in which the action "might have been brought" in view of the consent of the defendants. Further, the court specifically approved of those cases in which it was held that a transfer was proper even though the transferee district would not have had *venue* if the action had been instituted there and the defendant duly objected. In the *Anthony* case, *supra*, *both* defendants moved to transfer the action from New York to California where venue and personal jurisdiction were proper as to one defendant only. The action was transferred, and it was held that, since both defendants sought the transfer, the transferee district was one in which the action "might have been brought". In the *Paramount* case, *supra*, all defendants moved to transfer the action from Delaware to Texas where all of the defendants were amenable to service of process, but where venue was improper as to five defendants. The trial court determined that it did not have jurisdiction to transfer the action, and the defendants sought a writ of mandamus. It was held that, by joining in the motion to transfer, the five defendants waived their objection to venue in Texas; that the proposed

transferee district was one in which the action "might have been brought"; and that the trial court had jurisdiction to transfer the action.

The instant case is directly contrary to the decisions discussed in the preceding paragraph. The writ of certiorari should be granted to resolve this conflict.

(2) The United States Court of Appeals for the Seventh Circuit has rendered a decision which is in conflict with the decision of another court of appeals *in the same case*. *Ex Parte Blaski*, 245 F. 2d 737 (5th Cir. 1957), cert. denied, 355 U. S. 872 (1957). If the instant case is not reviewed by this Court, the action will be returned to the United States District Court for the Northern District of Texas. What will happen thereafter is a matter of conjecture. However, it is probable that the Clerk of that court will, in accordance with the *Blaski* decision, refuse to accept the action and will again send it to the United States District Court for the Northern District of Illinois, whence it will again be returned to Texas. Such circuity of action can be avoided only by a review of the decision in question.

(3) The United States Court of Appeals for the Seventh Circuit has erroneously decided an important question of federal law which has not been, but should be, settled by this Court to effect the orderly administration of justice. The question herein presented is one of importance to federal courts; it arises frequently. See, for example, in addition to the cases discussed above, the following cases in which the question arose: *Gilpin* v. *Wilson*, 148 F. Supp. 493 (M. D. Ala. 1957); *Hill* v. *Upper Mississippi Towing Corp.*, 141 F. Supp. 692 (D. Minn. 1956); *Mitchell* v. *Gundlach*, 136 F. Supp. 169 (D. Md. 1955); *General Electric Co.* v. *Central Transit Warehouse*, 127 F. Supp. 817 (W. D. Mo. 1955); *Cain* v. *Bowater's Newfoundland Pulp and Paper Mills, Ltd.*, 127 F. Supp. 949 (E. D. Pa. 1954);

Johnson v. *Harris*, 112 F. Supp. 338 (E. D. Tenn. 1953); *Hampton Theatres* v. *Paramount, etc.*, 90 F. Supp. 645 (D. D. C. 1950). Further, the question herein presented has been a subject of discussion and diverse opinion in treatises and numerous legal periodicals. See Moore, *Federal Rules and Official Forms*, p. 69 (1956); Kaufman, *Further Observations on Transfers Under Section 1404(a)*, 56 Col. L. Rev. 1 (1956); Note, 44 Cal. L. Rev. 792 (1956); Note, 8 Stanf. L. Rev. 338 (1956); Note, 68 Harv. L. Rev. 1467 (1955); Keeffe, *Venue and Removal Jokers in the New Federal Judicial Code*, 38 Va. L. Rev. 569 (1952); Note, 64 Harv. L. Rev. 1347 (1951); Note, 50 Mich. L. Rev. 347 (1951); Note, 60 Yale L. J. 183 (1951); Note, 30 Tex. L. Rev. 256 (1951); Note, 35 Cornell L. Q. 459 (1950); Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908 (1947) (discussing the proposed revision of the judicial code); and Note, 60 Harv. L. Rev. 424 (1947) (also discussing the proposed revision of the judicial code).

The legislative history of 28 U. S. C. § 1404(a) before its adoption affords no definite basis for interpretation of the section and, in particular, of the phrase "where it might have been brought." After the adoption of section 1404(a), however, and during the progress of the *Rodney* case and after its disposition, some thirteen bills were submitted in Congress to limit this section. All of the bills were identical in scope. The first eleven were reviewed by the Judicial Conference which reported unanimously on March 12, 1951, as follows:

> "In the 81st Congress, bills * * * which died with the expiration of that Congress, were introduced as follows: * * * H. R. 7550 and at least 10 other similar bills (H. R. 7585, 7636, 7640, 7642, 7841, 7844, 7868, 7885, 7893, and 8019) proposing to add to section 1404 of title 28 of the United States Code of a new subsection to limit the power to transfer actions from

one district or division to any other in which it might have been brought.

Your Committee has given consideration to four questions: * * *

(4) Should section 1404(a) of the revised code, relating to transfers, be repealed or amended? * * *

Wherefore, your Committee recommends—* * *

(4) That no change of the nature now proposed be made in section 1404 of the Judicial Code and that bills to accomplish such change be disapproved." *

These recommendations were presented to and approved by the Judicial Conference at its September 1951 meeting.

The reports and recommendations are reported in Report 1706 of the House of Representatives 85th Congress, 2nd Session, particularly pages 14, 21 and 27-29.

Accordingly, it is both logical and proper to interpret the section to facilitate the transfer of actions where transfer is warranted by convenience and the interest of justice. This purpose is effectuated by the *Blaski, Torres, Josephson, Anthony* and *Paramount* cases. It is frustrated by the instant case. Unless it is reviewed, this decision, taken together with the general venue statute, 28 U. S. C. § 1391, will unduly restrict transfer and impede the expeditious and orderly administration of justice.

Prior to the instant decision and the decisions of some district courts, it was well settled that a defendant could waive any objection to venue or personal jurisdiction.

---

* These bills sought to amend section 1404(a) by adding the following:

"(d) The preceding provisions of this section shall not apply to any civil action brought under any Act of Congress which vests in the plaintiff a choice of forum in which to bring suit and does not provide any authority for the transfer of the same to any other district or division."

This rule was in part codified in 28 U. S. C. § 1406(b) which provides that:

> "Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue."

The instant case derogates from this salutary rule by refusing to give effect to the defendants' *express* waiver of their objections to venue and personal jurisdiction in the transferee district.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX.

Transcript of Proceedings of March 14, 1958 before the Honorable Julius J. Hoffman, U. S. District Judge for the U. S. District Court, Northern District of Illinois, Eastern Division.

The Clerk: 58 C 127. John F. Blaski, *et al. versus* R. P. Howell, Jr., and Lifetime Metal Building Company.

The Court: I think I might run through this very fast. This is a motion to retransfer this cause to the Northern District of Texas. It came to me from Judge Perry's calendar, because of the fact the patent involved was the same as was involved in the other three cases which have gone to Judge Miner.

It appears that the plaintiffs here are residents of the Northern District of Illinois and that the defendants are residents of Texas. The plaintiffs assert that none of the defendants resides or does business in the Northern District of Illinois. The plaintiffs instituted an action for patent infringement in the Northern District of Texas. It is asserted by the plaintiffs that the acts of infringement occurred in the Northern District of Texas and that no acts of infringement occurred in the Northern District of Illinois. As far as I can tell, the defendants have not contested these assertions as to location, and I assume their truth for the purpose of deciding this motion.

Pursuant to 28 USC Section 1404 (a), the defendants moved to transfer the Texas action to the Northern District of Illinois. The trial court granted the motion and upon appeal by the plaintiffs in the form of mandamus the Fifth Circuit affirmed. The Supreme Court denied certiorari. *Ex parte Blaski*, 245 F. 2d 737 (Fifth Circuit,

1957), *certiorari denied* 355 U. S. 872 (1957). Accordingly the action was brought here.

Now, asserting that the Texas court lacked jurisdiction to transfer the action to Illinois, the plaintiffs moved to transfer the action back to Texas, and in connection with that motion, I refer to the section of the statute with which we are all familiar, but for the record, I will read it:

28 USC Section 1404 (a):

> "For the convenience of the parties and witnesses in the interest of justice a District Court may transfer any civil action to any other district or division where it might have been brought."

28 USC 1400 (b) sets forth the venue requirement in cases of patent infringement:

> "Any civil action for patent infringement may be brought in the judicial district where the defendant resides or where the defendant has committed acts of infringement and has a regular and established place of business."

If the plaintiffs had instituted action in this district, the defendant could have asserted correctly that venue was improper. We cannot find any relevant code provision pertaining to service of process in patent cases. Therefore I conclude that this case is governed by the general provision of Rule 4(f) of the Federal Rules of Civil Procedure, entitled "Territorial limits of effective service."

> "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the District Court is held."

Although the plaintiffs have not so specifically alleged, it appears from the uncontradicted assertions of the plaintiffs that service of process upon the defendants could not be had in this district.

The plaintiffs in their brief assert that this district is

not one in which the action might have been brought, using the words of 1404(a); that the Texas Court lacked jurisdiction to transfer this action; that this court may inquire into the jurisdiction of the Texas Court and that this court must remand the action to Texas.

The defendants assert that the jurisdiction of the transferor court has already been determined by the Fifth Circuit and that the issue is therefore *res judicata*, and that if this court were to remand, the Texas court would refuse to accept the case. Initially, it must be determined whether this court may inquire into the jurisdiction of the Texas Court to transfer the action. I am of the opinion that this court may so inquire and that the doctrine of *res judicata* and the law of the case raise no barrier to such inquiry.

Absent 1404(a) a District Court would have no authority to transfer an action to another district, nor would a district court have authority to accept such a transfer.

Section 1404(a) was enacted to provide such authority or jurisdiction. Consequently the inquiry is one pertaining to jurisdiction of the Texas court to transfer the action. *Foster-Milburn* v. *Knight*, 181 F. 2d 949 (Second Circuit, 1950); and to the jurisdiction of this court to accept the transfer, *Fettig Canning Co.* v. *Steckler*, 188 F. 2d 715 (Seventh Circuit). The transferee court must inquire into the jurisdiction of the transferor court.

United States v. *Reid*, 104 F. Supp. 260 (E. D. Arkansas, 1952).

Wilson v. *Kansas City Southern Railway Company*, 101 F. Supp. 56 (Western District of Missouri, 1951).

A transferee court must inquire into its own jurisdiction to accept the transfer.

Fettig v. *Steckler* which I mentioned before.

If either court lacks jurisdiction, the transferee court must remand the case to the transferor court.

Again I refer to the *Fettig* case and the *Reid* case, in that connection, and also the *Wilson* case.

The action of the transferee court is reviewable by mandamus. The *Fettig* case was a mandamus case involving Judge Steckler of Indianapolis.

The doctrine of *res judicata* and the law of the case, as I said a moment ago, cannot be imposed to remedy defects in jurisdiction.

That was said in the *Reid* case. Consequently I must determine whether the Texas court had jurisdiction to transfer this case. I think the Texas court had jurisdiction to transfer the action to any other district where it might have been brought. So essentially the question relates to statutory interpretation in ascertaining the meaning of the phrase "Where it might have been brought."

First, we consider the practice prior to the enactment of 1404(a). At common law a Federal district court, applying the doctrine of *forum non conveniens* could properly dismiss an action without prejudice if there existed another more convenient district in which the plaintiff could reinstitute his action. The doctrine presupposed two forums in which the defendants were amenable to service.

> *Gulf Oil Company* v. *Gilbert*, 330 U. S. 501 at 507 (1946).

Since it appears that the defendants are not amenable to process in Illinois, the doctrine of *forum non conveniens* could not have been applied in the case at bar.

Thus the ultimate issue presented by this motion is whether the same result must obtain under 1404(a) in the light of the phrase "Where it might have been brought."

The reviser's note to 1404(a) says this:

> "Subsection (a) was drafted in conformity with the doctrine of *forum non conveniens*."

Accordingly, early cases interpreting the section stated that the section merely codified the common law doctrine.

> Kaufman, Observations on Transfers, Section 1404(a).
>
> 10 FRD 595 at 598 (1951).

That is Judge Kaufman of the Southern District of New York.

More recent cases have expressed the view that 1404(a) constituted a substantial revision of the doctrine. *Norwood* v. *Kirkpatrick*, 349 U. S. 29 (1955).

Again I refer you to another article by Judge Kaufman, Further Observations on Transfers, under Section 1404(a) which he wrote for the Columbia Law Review.

> 56 Columbia Law Review, Page 1 (1956).

Although it may be accepted now that 1404(a) is broader in scope than the pre-existing practice, that fact alone does not resolve the question whether 1404(a) presupposes a transferee jurisdiction in which the defendant is amenable to service of process and in which venue is proper. Those cases which assert that 1404(a) transcends the common law doctrine do not deal with this question.

There is no legislative history of reasonable applicability to the question. Accordingly, recourse must be had to the decided cases.

Four Circuits have considered the question and their decisions stand, I think, for the proposition that where the defendant moves to transfer an action to a district in which venue would be improper and/or the defendant would not be amenable to service of process, a waiver of these defects

is effected. And the court has jurisdiction to transfer the action. The Supreme Court has denied certiorari in three cases in which certiorari was sought.

Ex parte Blaski, who is our friend Blaski in these cases; *In re Josephson*, 218 F. 2d 174 (First Circuit, 1954).

Anthony v. *Kaufman*, 193 F. 2d 85 (Second Circuit, 1951).

Certiorari denied, 342 U. S. 955 (1952).

Paramount Pictures v. *Rodney*, 186 F. 2d 111 (Third Circuit, 1951).

Certiorari denied, 340 U. S. 953 (1951).

Accord: *General Casualty Company* v. *Keller*, 154 Federal Supplement 45. Eastern District of Wisconsin, 1957, and other district court cases which I do not now have before me.

Neither the Seventh Circuit nor the Northern District has been confronted with the question. In opposition to the cases cited above, other cases support the proposition that the district in which an action might have been brought is one in which venue and amenability to service of process exists apart from any consideration of waiver.

Shapiro v. *The Bonanza Hotel Co.*, 185 F. 2d 707 (Ninth Circuit, 1950).

General Electric Company v. *Central Transit Warehouse*, 127 Fed. Supp. 817 (Western District of Missouri, 1955); *Johnson* v. *Harris*, 112 F. Supp. 338 (Eastern District of Tennessee, 1953); *Hampton Theatres* v. *Paramount*, 90 F. Supp. 645 (D. D. C. 1950) and I suggest looking at the dissenting opinions in the *Paramount* v. *Rodney* case to which I referred a moment ago.

The leading case in support of transfer is the *Rodney* case. There action was instituted in Delaware under the

Clayton Act. All 14 defendants moved to transfer to Texas. Although by statute service of process was nationwide in Clayton Act cases, venue in Texas was improper as to five defendants. The trial court determined that it had no jurisdiction to transfer. The defendants sought mandamus, and it was held that the trial court did have jurisdiction. The problem was treated simply as one of waiver of venue. At pages 114 and 115, it is said:

> "Suits embracing the identical subject matter could have been brought against the defendants in any district court in Texas. Moreover, if brought, these suits could have been maintained unless there had been a seasonable objection to the venue by the defendant.
>
> "Even if the doctrine of *forum non conveniens* had been applied under the precise conditions required by the *Gulf Oil Company* v. *Gilbert*, those conditions are met by the instant circumstances, that is to say the Texas Court would have had the power to adjudicate the controversies and would have had jurisdiction of all defendants.
>
> "By joining in the motion to transfer, the defendants have waived any objection to Texas venue and have agreed to submit themselves to a Texas court. We think that consent is to be given the same effect under Section 1404(a) as it would receive under any other venue statute."

That is the end of that quotation.

Although there was no problem of service of process in the *Paramount* v. *Rodney* case as there is in the case with which we are concerned, the argument of waiver applies with equal vigor to the service of process. Service of process is an element of jurisdiction over the person, which jurisdiction can be waived.

In *Anthony* v. *Kaufman* to which I have alluded before, the plaintiff sued two defendants in New York. Both defendants moved to transfer to California. One of the two

defendants was not amenable to service of process in California. The trial court transferred the action. Reviewing the decision of the trial court, Judge Frank stated, 193 F. 2d at 86:

> "But here one defendant could have been served in the transferee district while the other defendant which could not have been served has joined in the application for and thus consented to the transfer. That consent is a waiver of lack of venue. If such waiver existed before the plaintiff commenced the suit, it could have been brought there. We think 28 USC 1404 covers such a case."

In the *Josephson* case to which I have referred there was involved a shareholder's derivative action which was instituted in Massachusetts. The defendant moved to transfer the action to New Mexico where venue was proper but where service of process could not be had. The action was transferred, and the first circuit affirmed. Although the decision rested in large part upon the fact that venue was proper in New Mexico, Chief Judge McGruder specifically approved the *Paramount* and *Anthony* cases in a lengthy dictum. With reference to the problem of the service of process, it was stated at page 186, that is reported in 212 F. 2d,

> "they were already subject to the personal jurisdiction of the United States District Court for the District of Massachusetts by service of process upon them, and this personal jurisdiction was transferred to the United States District Court for the District of New Mexico by the effect of the transfer order."

The three cases which I have just discussed were cited with approval and followed by the Fifth Circuit in *Ex parte Blaski*. That the Fifth Circuit was disposed toward a liberal interpretation of 1404(a) was evidenced by the following quotation:

> "The purposes for which 1404(a) was enacted would

> be unduly circumscribed if a transfer could not be made in the interest of justice to a district where the defendants not only waived venue, but to which they seek the transfer."

That is page 738, 245 F. 2d.

Many district court decisions are in accord with these cases. The plaintiffs' brief I observe makes no mention of these cases. Perhaps they would appear in some additional brief and I allowed one to be filed.

Now, as to cases rejecting the transfer to the Northern District of Illinois, as we all know a penetrating analysis of the problem is contained in the dissenting opinion in *Paramount* v. *Rodney*. Judges Hastie and McLaughlin noted that Congress had made specific provision for venue. In many cases venue may exist in several districts. In their opinion it was logical to permit transfer only to those districts in which statutory venue existed.

At 186 F. 2d 117, it was said:

> "It seems to us that in rejecting the specific venue provision governing actions under the Clayton Act as definitive of the limits of power to transfer suits under Section 1404(a) this court is holding that the latter statute empowers the District Court to transfer litigation to any district whatever if the court deems such action is just and convenient. In brief, the Court is holding that the concluding phrase in Section 1404(a), 'Where it might have been brought,' is surplusage."

In answer to the argument that a liberal construction of 1404(a) was to be preferred to further the ends of justice and convenience, it was said at page 118:

> "Whatever merit there may be in the matter of policy in the view implicit in the opinion of the court that a district court should be free to transfer cases according to justice and convenience without technical restrictions, we think Congress has not expressed or

> embodied that policy in Section 1404(a). If such had been the intention of Congress we think the concluding phrase of Section 1404(a) would have been omitted, but that phrase was included and we should give it substantial effect according to its tenor."

In answering the argument that the concluding phrase of 1404(a) should be interpreted in the light of the rule that defects of venue may be waived, it was said at page 119:

> "But we do not see how the conduct of a defendant after suit has been instituted can add to the forums where 'it might have been brought'. In the normal meaning of words, this language in Section 1404(a) directs the attention of the judge who is considering the transfer to the situation which existed when the suit was instituted."

In *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777, coming out of the Ninth Circuit, 1950, the phrase "might have been brought" was interpreted to exclude those districts in which the defendant was not amenable to service of process. However, it is to be noted that plaintiff was the movant and the defendant had not, expressly or by implication, waived service of process.

In *United States against Reid*, to which I have referred before, the transferee court remanded to the transferor court because service of process could not have been had in the transferee's jurisdiction. However, again the plaintiff was the movant.

In *Johnson versus Harris*, the district court denied the defendant's motion to transfer, asserting without citation of authorities that statutory venue must exist in the transferee jurisdiction. In *Hampton Theatre against Paramount* to which we have referred, a similar conclusion was reached, again without citation of authorities. In a lengthy dictum in *General Electric Company versus Central Transit Warehouse*, to which we have previously referred, the district

judge, now Mr. Justice Whitaker, expressly declined to follow *Paramount against Rodney*, and *Anthony against Kaufman* in a case in which the defendant was the movant for transfer.

Judge Whitaker relied *in toto* upon the reasoning of the dissenter in *Paramount against Rodney*.

Those cases which support the transfer of the case at bar to Illinois are approved in Moore, Federal Rules and Official Forms, page 69, 1956, and Kaufman, Further Observations on Transfers, under Section 1404(a). That is the Columbia Law Review article to which I have previously referred. The plaintiff relies on those cases cited in Section 3 of its memorandum which I am not reading.

In addition, the plaintiff relies upon *Wilson versus Kansas City Southern Railway*, 101 Fed. Supp. 56 (Western District of Missouri, 1951). *Felchlin versus American Smelting*, 136 Fed. Supp. 577 (Southern District of California, 1955).

The *Fettig* case, *Christopher against American News Company*, 176 F. 2d 11, a Seventh Circuit case decided in 1949.

Chicago, Rock Island and Pacific Railroad versus Igoe, 212 F. 2d 378 (Seventh Circuit, 1954).

In my view, the *Wilson* case is not in point. There the transferee court determined that the transferor court lacked jurisdiction over the person of the defendant. Accordingly the transferee court could not accept the case. It is my view also that the *Felchlin* case is not in point. There the transferee court determined in a diversity case that the law of the transferee state would not permit the plaintiff, a California executor, to maintain the action.

The *Fettig* case is not in point in my view. There an action *in rem* for condemnation of food was instituted in

Missouri. The *res* was before the Missouri District Court. By consent the action was transferred to Indiana. However, the *res* was not transferred. Accordingly it was determined that the transferee court lacked jurisdiction over the subject matter of the action.

In the *Christopher* case the defendant moved to transfer an action to New York asserting that companion cases were pending there. In a *per curiam* decision upholding the transfer the Seventh Circuit noted it was unlikely that the New York action could be transferred to Chicago because certain of the New York defendants could not be served in this district. The court's quotation relied upon by the plaintiff in the case at bar was dictum and I think vague, and I believe completely without authoritative value.

In the *Igoe* case the court was concerned only with its own power to review by mandamus the decision of the district court.

In referring to 1404(a), the court by way of dictum for no apparent reason asserted:

> "This section presuppeses two jurisdictions in which venue may be based. *Foster-Milburn Company versus Knight* (Second Circuit), 181 F. 2d 949."

In the cited case the Second Circuit held that upon motion by the plaintiff an action could not be transferred to a jurisdiction in which the defendant was not amenable to service of process. The Second Circuit reaches an opposite conclusion, where the defendant is the movant.

I refer you in that connection again to *Anthony* v. *Kaufman*.

Gentlemen, personally I am of the opinion that the dissent in *Paramount against Rodney* is supported by the greater weight of reason and logic and that this Court, if I were to rely on my own personal inclination, should retransfer this case to Texas.

Those cases supporting transfer to this district, I think, do great violence to the established rules of statutory construction.

They seem to create a doctrine of retroactive waiver in order to reach the conclusion that the action might have been brought. I feel, however, I must follow the law as it appears to me to be established, especially in view of the fact that the Supreme Court has consistently refused to grant certiorari to those cases supporting transfer to this district.

Accordingly, I deny the plaintiff's motion.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 12285. September Term, 1957, April Session, 1958.

JOHN F. BLASKI, *et al.*, *Petitioners*,
vs.
HONORABLE JULIUS J. HOFFMAN, United States District Judge, *Respondent*.

Original Petition for Writ of Mandamus.

July 1, 1958.

OPINION.*

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges*.

FINNEGAN, *Circuit Judge*. *Ex Parte Blaski*, 245 F. 2d 737 (5th Cir. 1957) is the opinion of the Fifth Circuit denying Blaski, et al., leave to file a petition for a writ of mandamus as a device for vacating an order of transfer from the Northern District of Texas to the Northern District of Illinois. After this case arrived in the United States District Court, Chicago, Illinois, the Texas plaintiffs (petitioners in our court) invoking 28 U. S. C. §1404(a), asked

* The Clerk of the United States Court of Appeals for the Seventh Circuit was requested to include this Opinion in the Certified Record but refused to do so on the basis of the Opinion of the Court, dated October 16, 1958, which withdrew this Opinion and set aside and vacated all orders entered pursuant thereto.

the respondent district judge to transfer the cause back to Texas. He denied plaintiff's motion and this mandamus petition followed. The *Blaski* opinion, just cited, adequately states the facts and petitioners' arguments in our court add nothing substantial — legally or factually. There appears to be no legalistic reason just why the respondent district judge should overrule the Fifth Circuit and we think petitioners fail in making any showing that judicial discretion has been abused. *General Casualty Company of America* v. *Grubb*, ... F. 2d ..... (7th Cir. 1958).

The petition for writ of mandamus is

DENIED.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 12285 September Term and Session, 1958

JOHN F. BLASKI et al., *Petitioners*,

vs.

HONORABLE JULIUS J. HOFFMAN, United States District Judge, *Respondent*.

Petition for Writ of Mandamus on Petition for Rehearing.

October 16, 1958.

OPINION.

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges*.

MAJOR, *Circuit Judge*. This Court, on July 1, 1958, rendered an opinion denying petitioners' petition for a writ of mandamus. Upon petition for rehearing, it is ordered that such opinion be withdrawn and that all orders entered pursuant thereto be vacated and set aside.

The facts which give rise to the legal issue for decision are not in dispute. Petitioners, as plaintiffs, on March 1, 1957 filed in the United States District Court, Northern District of Texas, Dallas Division (hereinafter referred to as the Texas Court or District), a complaint charging R. P. Howell, Jr. and Lifetime Metal Building Company with patent infringement. Plaintiffs reside or are doing business within the Northern District of Illinois (herein-

after referred to as the Illinois District). The complaint alleged acts of infringement committed by defendants in the Texas District, and no acts of infringement, so far as known, committed by either of the defendants in the Illinois District. Service of process was had upon defendants in the Texas District. Defendants answered the complaint and the case was set for trial.

In the meantime, defendants submitted a motion requesting transfer of the action to the Illinois District, under Title 28 U. S. C. A. Sec. 1404 (a), stating in their motion that defendants waived lack of venue in the Illinois District. Over objection of plaintiffs (petitioners here), the Texas Court directed that, for the convenience of the parties and witnesses and in the interest of justice, the action be transferred to the Illinois District.

Plaintiffs, after denial of their motion to vacate the order of transfer, filed a petition for writ of mandamus in the United States Court of Appeals for the Fifth Circuit, requesting that Court to issue an order to show cause why a writ of mandamus should not be issued against the Texas District Judge, nullifying the transfer order. The Court of Appeals (5 Cir.) held that the District Court was empowered by statute to make the transfer, and denied leave to file the petition. *Ex Parte Blaski et al.*, 245 F. 2d 737.

The papers and records in the Texas District infringement action were received in the Clerk's Office of the Illinois District pursuant to the transfer order. Thereupon, petitioners filed a motion in the Illinois District for an order directing the transfer of and remandment of the action to the Texas District, on the ground that the Texas Court was without power to order the transfer and, consequently, the Illinois Court did not acquire jurisdiction. A hearing on the petition and response thereto was had before Honorable Julius J. Hoffman, a Judge

of the Illinois District and respondent in the instant proceeding. Respondent, on March 14, 1958, entered an order denying petitioners' motion, and in an oral opinion stated his reasons therefor. Thereupon, petitioners filed in this Court the petition now before us for a writ of mandamus directing respondent to order such transfer and remand.

No question is raised, in fact all parties concede that under Sec. 1651 (a), Title 28, U. S. C. A., mandamus is an appropriate means for testing the legality of the order in controversy. Furthermore, our jurisdiction, if there be any doubt, is supported by the decision of this Court in *Chicago, R. I. & P. R. Co.* v. *Igoe*, 212 F. 2d 378.

The questions for decision appear to be correctly stated in petitioners' brief, and are as follows:

> "(1) Whether a district court, having proper venue and jurisdiction over defendants in a patent infringement action, has the power under Section 1404 (a), Title 28, U. S. C. A. to transfer the cause of action, on motion of the defendants and over the objections of the plaintiffs, to a district in which venue is not proper; and
>
> "(2) Whether, under such circumstances, the transferee court acquires jurisdiction, or has the power to accept such a transfer."

Two statutory provisions are pertinent: Secs. 1400 (b) and 1404 (a), Title 28 U. S. C. A. Section 1400 (b), a venue provision, specifically applicable to actions for patent infringement, provides:

> "Any civil action for patent infringement *may be brought* in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business. [Italics supplied.]"

Section 1404 (a), relating to change of venue, provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division *where it might have been brought.* [Italics supplied.]"

It is not open to doubt but that petitioners' action was properly brought in the Texas District, where defendants not only resided but where the acts of infringement took place and where defendants had their regular and established place of business. It appears plain, also, that venue could not properly have been laid in the Illinois District. A solution of the problem before us reduces itself to the legal effect to be given the concluding phrase of Sec. 1404 (a), "where it might have been brought." Does that phrase refer to the district where such an action "may be brought" under Sec. 1400 (b)? If the question was of first impression, we would have no hesitancy in answering in the affirmative. It is a contradiction of terms and does violence to the plain, unambiguous language which Congress has employed, to reason that the Texas Court, with power to transfer the action only to a district "where it might have been brought," could exercise that power by ordering transfer to a district which it could not have been brought.

If the Texas District had the power on motion of defendants to transfer the action to the Illinois District, it likewise had the power on a similar motion to transfer it to any District Court in the United States. Counsel for respondent argues that the Illinois District was one where the action "might have been brought" because it had general jurisdiction of an action for patent infringement and acquired jurisdiction of defendants by their motion to transfer and their consent to trial in the Illinois District. Precisely the same argument could be made in support of the power of the Texas District if transfer

had been made to any other District Court in the United States. Counsel's argument, if accepted, renders the phrase "where it might have been brought" meaningless. The transfer provision would be complete absent the phrase of limitation. This phrase, however, cannot be ignored under the guise of statutory construction; to do so amounts to statutory emasculation.

It must be clearly kept in mind that there is no issue of discretion involved in the instant matter either on the part of the Texas District Judge in ordering the transfer or on the part of the respondent in refusing to remand it. The sole issue is that of power on the part of one to transfer, on the part of the other to accept and entertain jurisdiction. Also, the general rule should not be overlooked that a Federal Court has only such jurisdiction or power as Congress has specifically conferred. The venue where a patent infringement action may be brought, as well as the district to which it may be subsequently transferred, has been clearly delineated by Congress.

When Congress provided for transfer to a district "where it might have been brought," it is hardly open to doubt but that it referred to a district where the plaintiff, in a case sought to be transferred, had a right to bring the case. Under the decisions of the Supreme Court and other courts, the action could have been properly brought only in the district (1) where defendant resides or (2) where defendant has committed acts of infringement and has a regular and established place of business. Under the admitted facts, the action could have been properly brought only in the Texas District. Conversely, it could not have been properly brought in the Illinois District.

In *Stonite Products Co.* v. *Melvin Lloyd Co., et al.*, 315 U. S. 561, the question for determination was whether Sec. 48 of the Judicial Code (Title 28 U. S. C. A. Sec. 109) was

the sole provision governing venue of patent litigation. Referring to that section, the Court stated (page 562):

> "Section 48 gives jurisdiction of suits for patent infringement to the United States district courts in the district of which the defendant is an inhabitant, or in any district in which the defendant shall have committed acts of infringement and have a regular and established place of business."

On the following page the Court stated:

> "We hold that Section 48 is the exclusive provision controlling venue in patent infringement proceedings."

Section 48, before the Court in Stonite, was the predecessor venue provision to Sec. 1400 (b) of the present Code. The holding in *Stonite*, however, is equally applicable to the present venue provision. *Fourco Glass Co.* v. *Transmirra Products Corp. et al.*, 353 U. S. 222. The Court in the latter case stated (page 228):

> "For it will be seen that Section 1400 (b) is equally clear and, also, that it deals specially and specifically with venue in patent infringement actions."

And again, on the following page:

> "We hold that 28 U. S. C. Sec. 1400 (b) is the sole and exclusive provision controlling venue in patent infringement actions * * *."

See also the recent opinion by Judge Mercer in *Gas Products Corp.* v. *George D. Roper Corp. et al.*, 147 F. Supp. 853.

When Congress provided for the transfer of a case to a district "where it might have been brought," it meant the district where plaintiff has a recognized right to bring his case under the Venue Act and that this right was unqualified and absolute, not depending upon consent of the defendant, evidence by waiver, entry of appearance, or otherwise. If when a suit is commenced, plaintiff has a

right to sue in that district, independently of the wishes of defendant, it is a district "where it might have been brought." If he does not have that right, independently of the wishes of defendant, it is not a district "where it might have been brought," and it is immaterial that the defendant subsequently acquiesces. The test is, did the plaintiff have an independent right to commence suit in the district to which it is sought to make transfer? If so, it is a district "where it might have been brought"; otherwise, it is not such a district. We recognize, of course, that venue may be waived under proper circumstances, but we do not think it can be waived in a forum in which an action has not and could not have been properly brought by the opposing party. To hold otherwise is to permit a defendant to select a forum not available to a plaintiff as a matter of right, and over plaintiff's objection.

Respondent in his brief states:

> "Petitioners fail to recognize the difference between jurisdiction of the subject matter and venue over the particular defendants. The District Court had jurisdiction of the subject matter at the time the original suit was brought by reason of the very nature of the suit, *i. e.*, patent infringement."

True, every District Court has jurisdiction over patent infringement litigation generally but the suggestion must be novel, certainly not sound, that the Illinois Court acquired jurisdiction of the subject matter of the instant action at the time it was brought in the Texas District. No court, so far as we are aware, in an action for patent infringement or any other, acquires jurisdiction either of the subject matter or of the parties until the action is properly brought in such court. Furthermore, it begs the question to suggest that the Illinois Court acquired jurisdiction via the transfer because that is dependent upon the issue for decision, that is, whether Congress has en-

dowed the transferring court with power to order the transfer. As shown, the action could not properly have been brought in the Illinois Court, and, therefore, it was not a district "where it might have been brought." Consequently, the Texas Court was without power to order the transfer and the Illinois Court acquired neither jurisdiction nor venue of the action.

Our conclusion is based upon what we think is a clear congressional mandate. In *Ex Parte Collett*, 337 U. S. 55, the Court held that the phrase "any civil action" found in Sec. 1404 (a) was applicable to an action under the Federal Employers' Liability Act. In so doing the Court stated (page 58):

> "The court below relied on the language of Sec. 1404 (a), *supra*, which it regarded as 'unambiguous, direct, clear.' We agree. The reach of 'any civil action' is unmistakable. The phrase is used without qualification, without hint that some should be excluded."

In our view, the phrase "where it might have been brought" contained in the same section is equally unambiguous, direct and clear.

Notwithstanding the emphatic view which we entertain, it must be conceded that a solution of the problem has engendered much controversy in the courts and that there is respectable opposing authority, although upon analysis it is not as imposing as counsel would have us believe. An attempt to distinguish or analyze such cases in detail would unduly prolong this discussion. A reading of all the cases where the question has been considered leads to the view that the weight of authority sustains our conclusion in the matter.

Respondent asserts that four Courts of Appeals have sustained the power of the court to transfer under the circumstances of the instant case. *Ex Parte Blaski, et al.*,

245 F. 2d 737 (5 Cir.); *In Re Josephson*, 218 F. 2d 174 (1 Cir.); *Anthony* v. *Kaufman*, 193 F. 2d 85, and *Torres* v. *Walsh*, 221 F. 2d 319 (2 Cir.); *Paramount Pictures, Inc.* v. *Rodney*, 186 F. 2d 111 (3 Cir.). We regard *Blaski* as the most important of these cases because the Court refused to entertain a petition for mandamus directing the Texas District to vacate its order of transfer in the instant case. With great respect for that Court, we think its opinion discloses that it, like some other Courts, confused the issue of power to transfer with that of discretion where the power existed. In its opinion the Court stated (page 738):

> "The purposes for which Sec. 1404 (a) was enacted would be unduly circumscribed if a transfer could not be made 'in the interest of justice' to a district where the defendants not only waive venue but to which they seek the transfer."

This reasoning, so we think, ignores the statutory limitation of the power to transfer to a district "where it might have been brought." More than that, a court has no more right to unduly enlarge than it has to unduly circumscribe a limitation which Congress has specifically provided. In any event, we think the decision of the Fifth Circuit in this matter is erroneous. Such being the case, we are under no more obligation to follow it as the law of the case than that Circuit would be to follow what it considers an erroneous decision by this Court. See *Wilson* v. *Kansas City Southern Ry. Co., et al.*, 101 F. Supp. 56, 60.

In all the other cases above cited, except *Torres* v. *Walsh*, it appears that one or more of the defendants could have been sued in the district to which the action was transferred. Thus, the action "might have been properly brought" in such district. The *Torres* case involved an *in rem* proceeding in admiralty which presented a different situation as to venue and service. Notwithstand-

ing that some points of distinction may be drawn between the cited cases (except *Blaski*) and the instant case, it is fair to state that all of these cases contain language which in one way or another supports the power of the Texas Court in the instant matter.

The case most relied upon by respondent is *Paramount Pictures, Inc.* v. *Rodney*, 186 F. 2d 111. This case was decided by a court of five judges, two of whom dissented (Judges Hastie and McLaughlin). With due respect to the majority, we agree with the reasoning and logic of the dissenting opinion. The dissent states (page 119):

> "But we do not see how the conduct of a defendant after suit has been instituted can add to the forums where 'it might have been brought.' In the normal meaning of words this language of Section 1404 (a) directs the attention of the judge who is considering a transfer to the situation which existed when suit was instituted."

In agreeing with the dissenting members of that Court, we find ourselves in good company. In *General Electric Co.* v. *Central Transit Warehouse Co. et al.*, 127 F. Supp. 817, Judge Whittaker (then a District Judge, now a Justice of the Supreme Court) also agreed with the dissenting members in the *Paramount Pictures* case. More than that, he analyzed and distinguished that case on its facts. In our view, the opinion by Judge Whittaker is sound. His reasoning and logic is unassailable and we think he reached the correct result. A striking statement in his opinion, referring to the construction, there sought as it is here, of the phrase "where it might have been brought," is (page 826):

> "Would not such construction be to read that phrase entirely out of the statute? Would not such construction permit transfer of the action to *any district desired by the moving defendants*, though they, or some of them, could not have been served with process

there, and no statutory venue existed there, and the action could not have been maintained there, without their intentional waiver of venue and entry of general appearance? I think no such treatment can be given to that phrase in the statute. It, says Judge Learned Hand, " 'presupposes at least two forums in which the defendant is amenable to process.' " *Foster-Milburn Co.* v. *Knight*, 2 Cir., 181 F. 2d 949, 952."

We have read with interest Judge Hoffman's opinion. He makes a fair and detailed analysis of numerous cases. His counsel in this Court stated, "We, as counsel, cannot improve upon the discussion of the law on this subject which was included in Respondent's opinion." We agree that counsel have not improved upon Judge Hoffman's opinion. Among other things he stated:

"Gentlemen, personally I am of the opinion that the dissent in *Paramount* against *Rodney* is supported by the greater weight of reason and logic and that this Court, if I were to rely on my own personal inclination should retransfer this case to Texas.

"Those cases supporting transfer to this district, I think, do great violence to the established rules of statutory construction.

"They seem to create a doctrine of retroactive waiver in order to reach the conclusion that the action might have been brought."

After having thus reasoned, he concluded:

"I feel, however, I must follow the law as it appears to me to be established, especially in view of the fact that the Supreme Court has consistently refused to grant certiorari to those cases supporting transfer to this district."

It thus appears that respondent reasoned one way and decided the other. Certainly he had no sound basis for attaching weight to the fact that the Supreme Court has refused to grant certiorari in the cases supporting trans-

fer. See *Agoston* v. *Commonwealth of Pennsylvania*, 340 U. S. 844, 845.

We have heretofore quoted from Judge Whittaker's opinion in *General Electric Co.* v. *Central Transit Warehouse Co. et al.*, 127 F. Supp. 817, which includes a statement from *Foster-Milburn Co.* v. *Knight* (2 Cir.), 181 F. 2d 949, 952, that it (referring to Sec. 1404 (a)) "presupposes at least two forums in which the defendant is amenable to process." This Court, in *Chicago, R. I. and P. R. Co.* v. *Igoe*, 212 F. 2d 378, 379 (footnote), cited with approval the statement from the *Foster-Milburn* case. Numerous District Courts have embraced this view of the transfer section. *Nachtman* v. *Jones & Laughlin Steel Corp.*, 90 F. Supp. 739, 740; *Wilson* v. *K. C. Southern Ry. Co. et al.*, 101 F. Supp. 56; *Johnson* v. *Harris*, 112 F. Supp. 338, 341; *Mitchell* v. *Gundlach*, 136 F. Supp. 169, 172; *Felchlin* v. *American Smelting & Refining Co.*, 136 F. Supp. 577, 581; *Hill* v. *Upper Mississippi Towing Corp.*, 141 F. Supp. 692, 694; *Gilpin* v. *Wilson*, 148 F. Supp. 493.

In the last cited case, the latest which we find on the subject, the Court after reviewing the case law decided that the transferee district must be one where the action might have been originally brought. In so deciding, the Court stated (page 494):

> "The Court, while recognizing the divergence of authority on this question, is persuaded that a district wherein the action 'might have been brought' infers that the transferee district must be not only a district wherein venue lies and a complaint may be filed, as indeed one may file a complaint at will, but the transferee district must also be one in which the action might have been legally maintained and service of process effected upon the defendant. This view comprises the weight of authority and is represented by well-reasoned decisions from both the Second and Ninth Circuits."

(*Foster-Milburn Co.* v. *Knight*, 2 Cir., 181 F. 2d 949, and *Shapiro* v. *Bonanza Hotel Co.*, 9 Cir., 185 F. 2d 777.) The Court in *Gilpin* cites other cases which have expressed the same view, including *Blackmar* v. *Guerre et al.* (5 Cir.), 190 F. 2d 427, 429, wherein the Court stated:

> "Transfer under those sections [1404 (a) and 1406 (a)] is limited to districts where the suit could be originally brought. [Citing cases.]"

In *Ex Parte Collett*, 337 U. S. 55, the Court considered the doctrine of *forum non conveniens* as it relates to Sec. 1404 (a). In that connection, the Court discussed the transfer section together with the venue provision there involved. While the issue in the instant case was not directly involved, we think the reasoning by analogy supports the view that the transferee district must be one where the action could have been properly brought. (See pages 59 and 60.) Counsel for respondent attempt to escape the reasoning of *Collett* on the basis of *Norwood* v. *Kirkpatrick*, 349 U. S. 29, which is claimed broadened the scope to be awarded Sec. 1404 (a). The suggestion is without merit. *Norwood* had nothing to do with the statutory limitation on the power of a District Court to transfer. The case is concerned solely with the matter of the Court's discretion. The Court stated (page 32):

> "As a consequence, we believe that Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

For a discussion of the *Norwood* case see *Clayton* v. *Swift & Co.*, 137 F. Supp. 219, 221.

So that there will be no misunderstanding as to our

position on the power of a District Court to transfer an action to another district, we refer to a recent opinion of this Court. *General Casualty Co.* v. *Grubb*, 253 F. 2d 51. Unfortunately this case is sometimes cited in support of the thesis that a District Court has the power to transfer to a forum where the action could not have been originally brought. Whether the issue of power was before the Court in the *Grubb* case the opinion does not disclose. If so, it is evident that the issue was undecided. The case was decided solely on the issue of the District Court's discretion to order the transfer. As the Court stated (page 53):

> "On the other hand, we are appraising discretion exercised under Sec. 1404 by the district court and all we can do is to determine whether the respondent Judge abused it while at the same time, guarding against substituting our discretion for his."

The writ of mandamus is allowed, and respondent is directed to vacate and set aside his order entered March 14, 1958, and to order the action remanded to the United States District Court, Northern District of Texas, Dallas Division.

FINNEGAN, *Circuit Judge*, Dissenting. An opinion in this case, written by me, and in which Judge Major and Judge Schnackenberg joined with me, was handed down July 1, 1958. Now my two colleagues have changed their position, and on rehearing ordered withdrawal of our earlier unanimous opinion. Since I adhere to my original position of refusing the peremptory writ of mandamus in this case, I am explaining my reasons for dissenting.

At the outset, I underscore two items. (1) The record underlying this current majority opinion has remained unchanged since the day when we three judges handed

down our first *Blaski* opinion. (2) John F. Blaski, MPH Manufacturing Corporation, Inc., Peter S. Pedersen, Peter S. Pederson, Jr., co-partners d/b/a Central Farm Equipment Company, petitioners here, had earlier, October 3, 1955, sought a writ of mandamus in our Court to expunge Judge Tehan's order transferring their case brought in the Eastern District of Wisconsin against Inland Steel Products Company, LeRoy Hermann and Robert Anderson, defendants, from the Eastern District of Wisconsin to the Northern District of Illinois for consolidation with other suits then pending in the latter District Court. Those cases involve the same patent as the case at bar. Judge Schnackenberg joined with Judge Lindley in an order, entered October 3, 1955, denying the petition of Blaski, et al. for mandamus. The petition for a writ of mandamus in that case shows Blaski, et al. challenged the power of Judge Tehan to transfer, or in the alternative, claimed the District Judge abused his discretion.

Ex Parte Blaski, 245 F. 2d 737 (5th Cir. 1957) is the Fifth Circuit's opinion denying leave to file a petition for a writ of mandamus to vacate the order entered by the United States District Court in Texas transferring the case at bar to the Northern District of Illinois. Judge Jones, speaking for the Fifth Circuit, when rejecting the petition presented by Blaski, et al., pointed out (245 F. 2d 737):

> "The movants here, who were plaintiffs in the district court, have their *residence* in the Northern District of Illinois. They instituted suit in the district court for the Northern District of Texas against several defendants, all of whom reside in the Northern District of Texas * * * The defendants made a motion to transfer the cause, pursuant to 28 U. S. C. A. § 1404(a), to the Northern District of Illinois. In their motion the defendants stated that their witnesses were much closer to the court in Illinois than to the court in Texas. They also state, among other aver-

ments, *that there is pending in the district court for the Northern District of Illinois a consolidated action in which the plaintiffs in the Texas suit* were charging infringement of the *same patent as was involved in the suit in Texas.* It was shown that in the action in the Northern District of Illinois much pre-trial information and evidence had been developed which would be relevant in the case commenced in the Northern District of Texas. *The defendants waived their right to be sued in the Northern District of Texas and consented to the consolidation of the action with the cause pending in Illinois.* • • •

"The plaintiffs say that none of the defendants reside in Illinois and have not committed in Illinois any acts of infringement, that process issued in Illinois could not have been served on the defendants and therefore the action could not 'have been brought' in the district to which it was transferred. The attempted waiver, the plaintiffs say, is ineffectual." (Italics supplied.)

As I understand Judge Major's opinion in this rehearing, he holds that unless there is venue under 28 U. S. C. § 1400 in at least two forums, a trial judge is restrained from basing any order of transfer on 28 U. S. C. § 1404 (a). In reaching that result Judge Major disagrees, as I view it, with the Fifth Circuit that a transfer is proper on motion of a defendant who consents to the transfer (by waiving venue in the transferor court) even though the defendant is not amenable to venue in the transferee court selected by such movant, I doubt if any one would seriously urge that the *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U. S. 222 (1957) holding precludes all transfers of patent cases when § 1404 (a) is involved, especially after noticing the words "any civil action" used by Congress in § 1404(a).

Literally speaking, the defendants-litigants in the case before us, "waived their right to be sued in the Northern

District of *Texas*" [See 245 F. 2d 737]; they did not, with all deference to Judge Major, waive venue "in a forum in which an action had not been and could not be properly brought by an opposing party."

Venue under 28 U. S. C. § 1400 (b) means only the place where these defendants could require the case to be tried and as a word "venue" refers neither to jurisdiction nor power to decide the case. Locality of trial is a personal privilege which these defendants could waive. *In Re Josephson*, 218 F. 2d 174, 184-185 (5th Cir. 1954), and cases there collected. Venue for commencing patent suits is predetermined by § 1400 (b), but there is nothing in that section contained preventing the place of trial from being shifted in accordance with the yardsticks of "the convenience of parties and witnesses in the interest of justice," provided by § 1404. These Texas defendants have consented to consolidation of the Texas suit with those long since pending in Illinois.

I think the Fifth Circuit penetrated the problem at hand and soundly concluded that:

> "The rule which to us seems the better reasoned and which has been adopted by the mapority of the courts, permits the transfer upon the motion or with the consent of the defendants even though they could not have been served with the process of the transferee court * * *" (245 F. 2d 737, 738).

Judicial discretion came into play after the defendant waived venue in Texas and consented to the consolidation with Illinois pending litigation on the same patents. Rather than abuse of discretion I find the District Judge in Texas displayed some sound practical common sense. Indeed I think the bare words "where it might have been brought" in § 1404 (a), are being used here as an intellectual go-cart just to wheel the case back again to Texas. This case ought to be resolved on its peculiar facts and against the

background of lawsuits begun by *Blaski, et al.* in Wisconsin and Texas. As I have previously said, there appears to be no legalistic reason just why the respondent judge should overrule the Fifth Circuit. I would deny the petition for writ of mandamus just as I would have struck down a petition in the nature of a writ prohibition, which at least would have been potentially more appropriate.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Thursday, October 16, 1958.

Before

Hon. J. Earl Major, Circuit Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.

JOHN F. BLASKI, *et al.*, *Petitioners*,
No. 12285. *vs.*
HONORABLE JULIUS J. HOFFMAN, United States District Judge, *Respondent.*

Petition for writ of mandamus on petition for rehearing.

JUDGMENT.

This matter comes before the Court on the petition for rehearing filed by petitioners John F. Blaski, *et al.*, and the reply of respondent thereto.

On consideration whereof, it is ordered and adjudged by this Court that the opinion of this Court heretofore filed in this matter on July 1, 1958 be, and the same is hereby

withdrawn and that all orders entered pursuant thereto be vacated and set aside.

It is further ordered and adjudged by this Court that the petition of petitioners John F. Blaski, *et al.*, for a writ of mandamus be allowed, and the respondent is directed to vacate and set aside his order entered March 14, 1958 and to order the civil action, docket No. 58 C 127, John F. Blaski, et al., plaintiff's *vs.* R. Howell, Jr. and Lifetime Metal Building Company, defendants, remanded to the United States District Court for the Northern District of Texas, Dallas Division, in accordance with the opinion of this Court filed this day.

Teste:

KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

(Seal)

ORDER DENYING REHEARING *EN BANC*.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Tuesday, November 25, 1958.

Before:

Hon. F. Ryan Duffy, Chief Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. John S. Hastings, Circuit Judge.
Hon. W. Lynn Parkinson, Circuit Judge.
Hon. Win G. Knoch, Circuit Judge.

JOHN F. BLASKI, *et al.*,
Petitioners,
No. 12285 *vs.*
HONORABLE JULIUS J. HOFFMAN,
United States District Judge,
Respondent.
} Original Petition for Writ of Mandamus.

On consideration of the motion of counsel for Philip L. Sullivan, Chief Judge of the United States District Court for the Northern District of Illinois,

It Is Hereby Ordered that the brief as *Amicus Curiae* of Philip L. Sullivan, Chief Judge of the United States District Court for the Northern District of Illinois, tendered to the Clerk of this Court on October 25, 1958 be filed instanter.

As a majority of the judges in active service have not voted in favor of granting a rehearing *en banc*,

It Is Hereby Ordered that the petition for rehearing *en banc* filed herein on October 23, 1958 be, and the same is hereby DENIED.

(FINNEGAN, *Circuit Judge:* I vote to grant the petition for rehearing *en banc.*)

(KNOCH, *Circuit Judge:* I vote to grant the petition for rehearing *en banc.*)

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. [redacted] 25

HONORABLE JULIUS J. HOFFMAN, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,

Petitioner,

vs.

JOHN F. BLASKI, ET AL.,

Respondents.

RESPONSE TO PETITION FOR CERTIORARI

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THE BLAKELY PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 597.

HONORABLE JULIUS J. HOFFMAN, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,

Petitioner,

vs.

JOHN F. BLASKI, ET AL.,

Respondents.

RESPONSE TO PETITION FOR CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This is in response to the above identified Petition for Writ of Certiorari and is for the purpose of correcting and clarifying certain statements and contentions made therein. In so doing, the following remarks are set forth under headings corresponding to the respective headings of the sections of the Petition being replied to.

"OPINIONS BELOW."

The October 16, 1958 opinion of the Court of Appeals (App. p. 14a) is reported at 260 F. 2d 317.

"QUESTION PRESENTED."

The "question presented", as stated in the Petition for Certiorari, does not bring out that the subject civil action was one for patent infringement and, under the patent statutes, could not have been properly brought in the transferee district. It also does not bring out that the plaintiffs (respondents here), at all times, have opposed the subject transfer on the grounds that the District Court had no authority or power to do so.

It is respectfully submitted that the "question presented" should be as stated by the Court of Appeals below in its majority opinion (App. p. 18a) which is as follows:

> "(1) Whether a district court, having proper venue and jurisdiction over defendants in a patent infringement action, has the power under Section 1404(a), Title 28, U. S. C. A. to transfer the cause of action, on motion of the defendants and over the objections of the plaintiffs, to a district in which venue is not proper; and
>
> "(2) Whether, under such circumstances, the transferee court acquires jurisdiction, or has the power to accept such a transfer."

"STATEMENT OF THE CASE."

The statement of the case in the Petition should point out that the defendants had answered the complaint and the case had been set for trial when the motion to transfer was filed.

It also should be pointed out that the plaintiffs have at all times opposed the transfer on the grounds that the transferor court lacked the authority and power to do so because the transferee district was not a district in which the action "might have been brought".

It also should be pointed out that neither of the defend-

ants resides in or does business in the transferee district, and that the acts of infringement alleged in the complaint were committed in the transferor district and no acts of infringement have been committed by either of the defendants in the transferee district within the knowledge or belief of the plaintiffs."

"REASONS FOR GRANTING THE WRIT."

At pages 5-7 of the Petition for Certiorari it is contended that the decision complained of is in conflict with the decisions in the cases of *Torres* v. *Walsh* (CCA-2), 221 F. 2d 319; *In Re Josephson* (CCA-1), 218 F. 2d 274; *Anthony* v. *Kaufman* (CCA-2), 193 F. 2d 85; and *Paramount Pictures* v. *Rodney* (CCA-3), 186 F. 2d 111. In making this contention counsel for Petitioner stated (at page 5):

> "In the instant case, the court expressly recognized that a conflict existed,"

and then quoted a sentence from the Court of Appeals' opinion. That sentence, lifted out of context, might erroneously indicate that the Court of Appeals stated there was a conflict between its decision and the decisions in the above mentioned four cases. The Court of Appeals did not so recognize such a conflict. In fact, there is no conflict with those four cases, and the Court of Appeals expressly so stated in the three sentences immediately preceding the aforementioned quotation, and which three sentences are as follows (App. p. 24a):

> "In all the other cases above cited, except *Torres* v. *Walsh*, it appears that one or more of the defendants could have been sued in the district to which the action was transferred. Thus, the action 'might have been properly brought' in such district. The *Torres* case involved an *in rem* proceeding in admiralty which presented a different situation as to venue and service."

Also, at pages 5-7 of the Petition, it is contended that the United States Court of Appeals for the Seventh Circuit has erroneously decided an important question of federal law. It is respectfully submitted that the decision complained of is not erroneous, as is well shown by the thorough and very carefully and logically reasoned majority opinion of that Court (App. pp. 16a-29a).

At pages 9-10 of the Petition, counsel for Petitioner refers to the fact that a defendant may waive venue in an action brought by a plaintiff in an improper district, and then makes the statement that "The instant case derogates from this salutary rule * * *." It is submitted that this argument is clearly erroneous. This is not a case where the plaintiffs have sued in an improper district and the defendants have come in and waived venue. Here, the plaintiffs have sued in the *only* district where the action could have been *properly* brought. The defendants are trying to **force** the plaintiffs to try their action in an improper district. If the plaintiffs can be **forced** into the present transferee district, they could be **forced** into **any** district in the United States without any attention being paid to the limiting words "where it might have been brought" specifically put into the statute (Sec. 1404(a), Title 28, U. S. C. A.) by Congress.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1958.

No. [redacted] 25

HONORABLE JULIUS J. HOFFMAN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,

Petitioner,

vs.

JOHN F. BLASKI, ET AL.,

Respondents.

BRIEF OF PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 597.

HONORABLE JULIUS J. HOFFMAN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,

Petitioner,

vs.

JOHN F. BLASKI, ET AL.,

Respondents.

BRIEF OF PETITIONER.

OPINIONS BELOW.

The opinion of the District Court (R. 14) was not reported. The first opinion of the Court of Appeals (July 1, 1958) was not reported and was withdrawn. It is not in the record but will be found at page 14a of the appendix to the Petition for Certiorari. The opinion of the Court of Appeals of October 16, 1958 (R. 34), is reported in 260 F. 2d 317.

JURISDICTION.

The jurisdiction of this Court was invoked under 28 U. S. C., section 1254 (1). Certiorari was granted February 24, 1959; 359 U. S. 904, 3 L. Ed. 2d 570.

STATUTE INVOLVED.

This case involves 28 U. S. C. § 1404(a), 62 Stat. 937 (1948), which provides as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

QUESTION PRESENTED.

28 U. S. C. § 1404(a) confers authority on a United States District Court to transfer a civil action to any other district "* * * where it might have been brought." If the transfer of an action would serve the convenience of parties and witnesses and would be in the interest of justice, does 28 U. S. C. § 1404(a) confer upon a United States District Court statutory authority to transfer an action, upon motion of all defendants, to another United States District Court having jurisdiction of the subject matter but located in a district in which venue and jurisdiction over the person would be improper if the action had been instituted there and the defendants had duly objected?

STATEMENT OF THE CASE.

On March 1, 1957, the respondents filed suit in the United States District Court for the Northern District of Texas. It was alleged that respondents' patent had been infringed by R. P. Howell, Jr., a resident of Texas, and Lifetime Metal Building Company, a Texas corporation not doing business in Illinois. Pursuant to 28 U. S. C. § 1404(a), the defendants moved to transfer the case to the United States District Court for the Northern District of Illinois because two other cases involving the same patent were pending in that court and because numerous witnesses resided in that district. The defendants expressly waived their objection

to venue and personal jurisdiction. The Texas court determined that the transfer would serve the convenience of the parties and witnesses and that it would be in the interest of justice. Accordingly, the Texas court, in the exercise of its discretion, ordered the action transferred.

The respondents then sought a writ of mandamus in the United States Court of Appeals for the Fifth Circuit. The sole argument made by the respondents was that the Northern District of Illinois was not a district where the action "might have been brought" within the meaning of 28 U. S. C. § 1404(a), and that the Texas court lacked authority to transfer the action. However, the United States Court of Appeals for the Fifth Circuit held that the transfer was within the provisions of 28 U. S. C. § 1404(a) and denied the respondents' motion for leave to file a petition for a writ of mandamus. *Ex Parte Blaski*, 245 F. 2d 737 (5th Cir., 1957), cert. denied, 355 U. S. 872 (1957).

The action was transferred to the United States District Court for the Northern District of Illinois and was assigned to the calendar of the petitioner. Thereupon, the respondents moved the petitioner to return the action to Texas solely on the grounds that the Texas court lacked authority to transfer it and that the Illinois court lacked authority to accept it. The petitioner did not deem himself bound by the decision of the Fifth Circuit. Instead, he considered the question of jurisdiction *de novo* and, in an oral opinion (R. 14), denied the respondents' motion. The respondents then petitioned the United States Court of Appeals for the Seventh Circuit for a writ of mandamus to compel the return of the action to Texas. Again, the respondents contended that the Northern District of Illinois was not a district where the action "might have been brought" and that the Texas court lacked statutory authority to transfer the action. In addition, the

respondents contended that the Illinois court lacked jurisdiction to accept the transferred action. However, the respondents' petition was denied on July 1, 1958. The respondents then petitioned for a rehearing. The petition was granted, and, without re-argument, the original judgment was vacated and the writ of mandamus was issued on October 16, 1958, one judge dissenting (R. 34). The court held that:

> "If when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant, it is a district 'where it might have been brought.' If he does not have that right, independently of the wishes of defendant, it is not a district 'where it might have been brought,' and it is immaterial that the defendant subsequently acquiesces." (R. 39.)

The petitioner then moved for a rehearing *en banc*, but the motion was denied on November 25, 1958, two judges dissenting (R. 51).

ARGUMENT.

It is the position of petitioner that the decision of the court below was based upon an analysis of Section 1404(a) which looked no further than the bare words of the section. It was completely divorced from a consideration of the intention of Congress, the convenience of the parties, the interests of justice, or the history of the act before and after its passage.

In view of the fact that four Courts of Appeals have interpreted the act differently from the Court of Appeals for the Seventh Circuit, we do not imagine that respondents can contend that the act is unambiguous.[1] Petitioner therefore presents to this Court a question as to the interpretation of an ambiguous statute and asks that it be interpreted in accordance with the ordinary precepts of law as applied to statutory interpretation. Every one of these ordinary precepts was ignored by the Court of Appeals below.

I.

Section 1404(a) Is a Remedial Statute.

This section was adopted to overcome the lack of a convenient remedy, in contrast to that of *forum non conveniens* as applied in *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501 (1947). See Braucher, "The Inconvenient Federal Forum," 60 Harv. L. Rev. 908, 933 (1947), and note "The

1. The Court of Appeals below did say that the phrase "where it might have been brought" is "unambiguous, direct and clear." We think that this decision by a divided court imputes too little credit to the judges of the First, Second, Third and Fifth Circuits. Opinions by some fourteen circuit judges should be enough to satisfy any court that there is something to be said in behalf of a construction found by them.

Proposed Revision of the Federal Judicial Code," 60 Harv. L. Rev. 424, 435 (1947).

Being a remedial statute, it is to be liberally construed, and where there are two possible interpretations the more liberal is to be applied. *Stewart* v. *Kahn*, 78 U. S. 493, 504; 20 L. Ed. 176, 178 (1871).

In this particular instance, we think it serves little point to perform a literary autopsy upon individual words of the statute. We believe it sufficient to point out that there are at least two ways in which Section 1404(a) may be interpreted on a literal basis to provide a full grammatical basis for the interpretation applied by petitioner.

In the first place, the word "brought" may be interpreted to mean "commenced" as set forth in the opinion of Judge Biggs in *Paramount Pictures, Inc.* v. *Rodney*, 186 F. 2d 111, at 114.

Secondly, the word "might" was selected by Congress rather than the word "could." If the section had said "could," it might have implied that the plaintiff could, as a matter of right, have maintained his suit in the district to which transfer was sought. On the other hand, the selection of the word "might" is a clear indication that Congress foresaw that the ability to maintain a suit in the transferee jurisdiction might be dependent upon an outside permission.

These constructions, having a suitable literary foundation, should be sufficient to justify the liberal construction of the statute—particularly in the interests of justice.

II.

The History of the Act Indicates the Intention of Congress to Recognize the More Liberal Interpretation of Section 1404(a).

The expressed intention of Congress at the time the act was passed was, as pointed out above, to provide a new remedy. The intention of Congress as expressed after the passage of the act can, of course, only be drawn by inference. It has, however, frequently been pointed out that the failure of Congress to amend a statute after a series of judicial interpretations of the act is evidence that Congress intended that construction.

This is particularly true where the act itself has been under study by Congress in the meanwhile. See *National Labor Relations Board* v. *Gullett Gin Company, Inc.*, 340 U. S. 361, 365, 366 (1951), and *State of Missouri* v. *Ross*, 299 U. S. 72, 75; 81 L. Ed. 46, 49 (1936).

In the case of the Judicial Code, we need not point out that Congress relies upon this Court and that this Court has delegated at least its preliminary supervision to the Judicial Conference. In 1950-1951 some thirteen bills were submitted to Congress (and by it to the Judicial Conference), which sought to limit Section 1404(a), although in a different manner from that accomplished by the decision below. The Conference had the subject under study and recommended no change in Section 1404(a).

The report No. 1706 of the House of Representatives, 85th Congress, 2nd Session, pages 14, 21 and 27-29, sets forth the Judicial Conference report of March 12, 1951, and the proceedings from that time to 1957, including specific reference to the proposed changes in Section 1404(a). The fact that the section was under study during the period of the decisions by the First, Second, and Third Circuit Courts of Appeals (whose judges were represented on the

Conference) is clear indication that the situation is well within the rule of *National Labor Relations Board* v. *Gullett*, and *State of Missouri* v. *Ross*, *supra*.

III.

Petitioner's Interpretation of the Act Is in the Interests of Justice.

An ambiguous act, under proper rules of statutory construction, should be interpreted to avoid injustice, if any other interpretation is possible. *Knowlton* v. *Moore*, 178 U. S. 41, 77; 44 L. Ed. 969, 984 (1900).

In the present case there has been a finding of fact by both the District Court in Texas and by petitioner in the District Court here that the interests of justice will be promoted by the transfer from Texas to Illinois. This finding is not challenged.

There can be no question but what the same factors would apply in countless other cases.

If the opinion of the Court of Appeals below is correct, then it is difficult to conceive of any diversity of citizenship case concerning an individual defendant that could be transferred. Only in the unlikely situation where the defendant was domiciled in one state but happened to be available in the state where the plaintiff lived, could there be a transfer. Certainly Congress did not intend to remove from individual defendants their right to transfer to a jurisdiction convenient to them, and to the witnesses, and in which the interests of justice would be promoted by the transfer.

A similar situation would result in patent cases where transfer by both corporate and individual defendants would be severely curtailed.

The court below appeared fearful that a liberal construction of Section 1404(a) would permit transfers to

inconvenient and unjust forums. This presupposes a direct violation of the terms of the section itself by a district court, and, as this Court said in *Ivanhoe Irrigation District* v. *McCracken*, 357 U. S. 275, 2 L. Ed. 2d 1313, at 1330 (1958),

> "The prospect is too improbable to figure in our decision."

The Decisions of the Courts of Appeals for the First, Second, Third and Fifth Circuits Should Be Followed.

Petitioner's interpretation of Section 1404(a) has been adopted by the United States Courts of Appeals for the First, Second, Third and Fifth Circuits: *Ex Parte Blaski*, 245 F. 2d 737 (5th Cir., 1957), cert. denied, 355 U. S. 872 (1957); *Torres* v. *Walsh*, 221 F. 2d 319 (2d Cir., 1955), cert. denied, 350 U. S. 836 (1955); *In Re Josephson*, 218 F. 2d 174 (1st Cir., 1954); *Anthony* v. *Kaufman*, 193 F. 2d 85 (2d Cir., 1951), cert. denied, 342 U. S. 955 (1952); and *Paramount Pictures, Inc.* v. *Rodney*, 186 F. 2d 111 (3rd Cir., 1951), cert. denied, 340 U. S. 953 (1951). It was, in effect, adopted by the United States Court of Appeals for the Seventh Circuit in *General Casualty Co.* v. *Grubb*, 253 F. 2d 51 (7th Cir., 1958), cert. denied, 357 U. S. 907 (1958), even though that Court may have erroneously treated the problem as involving discretion rather than jurisdiction.[1] Only in the instant case has a United States Court of Appeals adopted the opposite interpretation, thereby frustrating that construction of Section 1404(a) which favors the interests of justice.

---

1. "By their motion to transfer defendants have agreed to become amenable to process in Oklahoma, and we cannot say Judge Grubb abused his discretion by viewing their consent as squaring with the phrase 'where is [*sic*] might have been brought' found in § 1404. See *Ex Parte Blaski*, 5 Cir., 1957, 245 F. 2d 737." (253 F. 2d at p. 53.)

It is interesting to note that the Court cited the *Blaski* decision which permitted the transfer of the instant action to the Northern District of Illinois, and which decision the Court declined to follow in the case at bar.

The doctrine of waiver is well established in the common-law of procedure. In addition, it is embraced by statute. Rule 12(h), Federal Rules of Civil Procedure, provides that the failure to make a timely objection constitutes a waiver as to all matters except (1) failure to state a claim or defense, (2) failure to join an indispensable party, and (3) want of jurisdiction over the subject matter. These matters are not before this Court.

Further, 28 U. S. C. § 1406(b) provides:

> "Nothing in this chapter [relating to venue] shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue."

The Revisor's Note to § 1406(b) states:

> "Subsection (b) is declaratory of existing law. (See *Panama R. R. Co.* v. *Johnson*, 1924, 44 S. Ct. 391, 264 U. S. 375, 68 L. Ed. 748.) It makes clear the intent of Congress that *venue provisions are not jurisdictional but may be waived.*" (Emphasis supplied.)

Sections 1404(a) and 1406(b) were enacted at the same time and should be construed together to permit waiver in cases transferred pursuant to § 1404(a). As stated in *Paramount Pictures, Inc.* v. *Rodney, supra*:

> "We can conceive of no reason in view of the provisions of § 1406 why candid voiced *express consent* should not be deemed to be as potent an actor in the drama of venue as puling *no seasonable objection.*" (186 F. 2d at p. 115.) (Original italics.)

The foregoing discussion, although limited to venue, applies with equal vigor to jurisdiction over the person, objections to which, in any case, can be waived.

CONCLUSION.

In *In Re Josephson*, 218 F. 2d 174 (1st Cir., 1954), Chief Judge Magruder stated, at p. 184:

> "Long before § 1404(a) was enacted, it was held, under earlier venue statutes providing that an action 'may be brought' only in certain districts, that venue requirements might be waived, conferring as they did only a personal privilege for the convenience of litigants, and that when a party chose to waive such privilege the action might not only be brought, it might be maintained, in a district not having statutory venue. See *Commercial Casualty Ins. Co.* v. *Consolidated Stone Co.*, 1929, 278 U. S. 177, 49 S. Ct. 98, 73 L. Ed. 252; *Neirbo Co.* v. *Bethlehem Shipbuilding Corp., Ltd.* 1939, 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167. Reading § 1404(a) in the light of this settled doctrine, it seems to us altogether proper to hold that a case may be transferred to a district not having statutory venue provided the defendant or defendants for whose benefit the venue privilege is conferred agree to waive the same. Such an interpretation indeed is to be favored, since it tends to enhance the usefulness of this important provision for administrative transfer of cases in the interest of convenience and justice."

The decision of the petitioner at the trial level was consistent with the well-established doctrine of waiver, with the purpose and legislative history of § 1404(a), with the rules of statutory construction and with sound policy. That decision was reversed by the decision of the United States Court of Appeals for the Seventh Circuit. It is respectfully submitted that the latter decision should be reversed by this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 25

HONORABLE JULIUS J. HOFFMAN, JUDGE OF THE UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,

Petitioner,

vs.

JOHN F. BLASKI, ET AL.,

Respondents.

BRIEF FOR RESPONDENTS.

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Respondents.

BRIEF FOR RESPONDENTS.

To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

QUESTION PRESENTED.

The "Question Presented", as stated in the Brief for Petitioner, ignores the fact that the subject civil action was one for patent infringement and, under the Patent Statutes, could not properly have been brought in the transferee district (Illinois). It also does not bring out that the plaintiffs (respondents here) at all times, have opposed the subject transfer on the grounds that the transferor District Court (Texas) had no authority or power to do so.

It is respectfully submitted that the "Question Presented" should be as stated by the Court of Appeals below in its majority opinion (R. 36) which is as follows:

> "(1) Whether a District Court, having proper venue and jurisdiction over defendants in a patent infringement action, has the power under Section 1404(a), Title 28, USCA, to transfer the cause of action, on motion of the defendants and over the objections of the plaintiffs, to a district in which venue is not proper; and
>
> (2) Whether, under such circumstances, the transferee Court acquires jurisdiction, or has the power to accept such a transfer."

ARGUMENT.

The United States Court of Appeals for the Seventh Circuit, in a very thorough, logical and carefully reasoned opinion in this case (R. 34-46) has answered both of the above set forth questions in the negative. That Court further observed that to hold otherwise would be to emasculate an express provision of the very statute (Sec. 1404(a), Title 28 USC) under which the defendants in the original case below sought to have this case transferred from the district court in Texas to the district court in Illinois after a trial date had been set in the Texas Court.

It is respectfully submitted that, as will be briefly discussed hereinafter, the aforementioned opinion of the United States Court of Appeals for the Seventh Circuit is in accordance with the law and the established rules of statutory construction, and should be affirmed.

THE STATUTORY SECTION UNDER WHICH TRANSFER OF THIS CASE WAS SOUGHT.

Section 1404(a), Title 28 USC, is the statutory section under which transfer was sought in this case. It provides as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division *where it might have been brought*"*

* Emphasis added throughout this brief unless otherwise indicated.

THE STATUTORY SECTION UNDER WHICH THIS ACTION WAS BROUGHT.

The civil action which forms the subject matter of this case and which the defendants sought to transfer from the Texas court to the Illinois court was one for patent infringement. Therefore, it was brought under Sec. 1400(b), Title 28 USC of the patent statute. As this Court stated in *Fourco Glass Co.* v. *Transmirra Products Corp., et al.*, 353 U. S. 222, at page 229:

> ". . . 28 USC Sec. 1400(b) is the *sole* and *exclusive* provision controlling venue in patent infringement actions . . ."

That section provides as follows:

> "Any civil action for patent infringement *may be brought* in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

Both the Petitioner and the respondents agree that Illinois does not qualify under the provisions of this section of the patent statutes, and that Texas does.

PRIOR TO SEC. 1404(a) FEDERAL DISTRICT COURTS HAD NO POWER TO TRANSFER CIVIL ACTIONS FROM ONE DISTRICT TO ANOTHER.

As the Petitioner stated in his opinion below (R. 16):

> "Absent 1404(a) a district court would have no authority to transfer an action to another district, nor would a district court have authority to accept such a transfer".

That, of course, is true.

It is well established that the district courts have no inherent powers to transfer a cause from one district to another, and that the only powers that they have in this

regard are those specifically granted to them in the form of statutory grants.

Thus, for example, in the case of *Fettig Canning Co.* v. *Steckler* (CCA-7, 1951), 188 F. 2d 715, 717, the Court stated in part as follows:

> "No authority need be cited for the proposition that the jurisdiction of a Federal Court is limited to that which Congress has expressly conferred."

In the case of the *United States* v. *Hudson, et al.* (U. S. S. Ct., 1812), 7 Cranch 72, 3 L. Ed. 259, 260, the Supreme Court gave early express recognition to the now well established principle that, other than the Supreme Court, the Federal Courts of the United States possess no jurisdiction other than that specifically vested in them by Congress. In this regard, the Court stated in part as follows:

> "Of all the courts which the United States may, under their general powers, constitute, one only—the Supreme Court—possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. *All other courts created by the general government possess no jurisdiction but what is given them by the power that creates them,* and can be vested with none but what the power ceded to the general government will authorize them to confer."

In the relatively recent case of *Richlin* v. *American Smelting and Refining Company,* 136 F. Supp. 577 (D. S. S. D. Calif., N. D., 1955), in denying a motion of defendant for a change of venue to a forum where the action could not have been brought originally, the Court (Jertberg, J.) stated as follows at pages 580 and 581:

> "The plaintiff could not have 'brought' the action there originally. *This is not a question of venue or jurisdiction that can be waived by the parties. It is a*

question of the power of a Court to transfer the action. This is a case similar to *United States* v. *11 Cases, etc.*, D. C., 94 F. Supp. 925, 927, in which Judge Fee, presently a member of the Ninth Circuit Court of Appeals, said that *the existence of the power of transfer is jurisdictional, and may only be exercised in strict accordance with the statutory grant.*

> "A district court is a separate entity. No district court has jurisdiction crossing a state line. *By virtue of these limitations, the transfer of any cause from one district to another is a question of power. No district court has such inherent authority. There must be an express statutory grant as a condition precedent to the initiation of the transfer, and every essential factor must be present to confer jurisdiction on the court to which the case is sent.*"

Sec. 1404â has given District Courts power to transfer a civil action to another district. However, that power is specifically limited, as will be discussed hereinafter.

THE TRANSFEREE COURT MUST INQUIRE INTO JURISDICTION.

The Petitioner agrees (R. 17) with respondents that the transferee court must inquire into the jurisdiction of the transferor court and into its own jurisdiction to accept the transfer, and that the transferee court is not bound by an erroneous decision of a court in another circuit (*United States* v. *Reid*, E. D. Ark., 104 F. Supp. 260, 266; and *Wilson* v. *Kansas City Southern Railway Company*, W. D. Mo., 101 F. Supp. 56, 60).

UNDER THE DOCTRINE OF FORUM NON CONVENIENS THE ILLINOIS DISTRICT WOULD NOT HAVE QUALIFIED AS A SECOND FORUM IN THIS CASE.

Prior to the adoption of Sec. 1404(a), Title 28 USC, a district court could, in proper cases, dismiss an action for purposes of permitting it to be refiled in another forum under the doctrine of *forum non conveniens*. It was well established law under that doctrine that

> "In all cases in which the doctrine of *forum non conveniens*" came into play, it presupposed "at least two forums in which the defendant is amenable to process." *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 506, 507.

There is no question but that the present transferee district (Illinois) would not have qualified under the doctrine of *forum non conveniens* as the second forum in which the case could have been refiled if the transferor court had dismissed it.

THE PURPOSE OF SEC. 1404(a) WAS TO RENDER APPLICABLE THE DOCTRINE OF FORUM NON CONVENIENS TO ALL CIVIL ACTIONS.

The purpose of Sec. 1404(a), Title 28 USC, was to render applicable the doctrine of *forum non conveniens* to *all* civil actions. In the case of *Ex parte Collette*, 337 U. S. 55, this Court stated with respect to Sec. 1404(a), at page 56, as follows:

> "In this case we must decide whether the venue provisions of the judicial code render applicable the doctrine of *forum non conveniens* to actions under the Federal Employers Liability Act."

It then went on to hold that Sec. 1404(a) rendered the doctrine of *forum non conveniens* applicable to *any* civil action.

The doctrine of *forum non conveniens* has always re-

quired two forums in which jurisdiction would have been proper at the time suit was commenced. That has not changed. Thus, in the case of *Norwood* v. *Kirkpatrick*, 349 U. S. 29 (wherein the *Ex parte Collette* decision was cited with approval), the Supreme Court held that although a transfer could be made on a lesser showing of inconvenience,

> "This is *not* to say that the *relevant factors* have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

One of those "relevant factors" which this Court has expressly said is *not* changed is the necessity for a second forum in which the action might *properly* have been brought originally. Congress continued this specific limitation by providing that a transfer may be made only to a district where the action "*might have been brought*". The patent statute (Sec. 1400(b), Title 28 USC) which this Court has specifically held is controlling in cases of this nature (*Fourco Glass Co.* v. *Transmirra Products Corp., et al.*, 353 U. S. 222, 229, *supra*), states that patent infringement actions

> "*may be brought* in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business,"

and provides for no other forum. The Illinois district admittedly does not qualify under either of these requirements.

THE ESTABLISHED RULES OF STATUTORY CONSTRUCTION REQUIRE THAT NO TRANSFER BE PERMITTED IN THIS CASE TO THE ILLINOIS DISTRICT.

As is stated in "Statutes and Statutory Construction", 3rd Ed., by G. J. Sutherland,

> "'It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute' (citing cases). A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, * * *"

That is in accordance with the law as laid down by this Court in the case of *United States of America* v. *Menasche*, 348 U. S. 528, 538, 539, wherein this Court stated as follows at pages 538 and 539:

> "It is our duty 'to give effect, if possible, *to every clause and word* of a statute,' *Montclaire* v. *Ramsdell*, 107 U. S. 147, 152, 27 L. Ed. 431, 433, 2 S. Ct. 391; rather than to emasculate an entire section, as the government interpretation requires."

The presence or absence of abuse of discretion is not involved in the present case at all. The important question, which is clearly presented by the facts of this case, involves *only* the meaning of the words "where it might have been brought." That question is:

> Has Section 1404(a) Title 28 USCA, by providing that a cause of action may be transferred to another district "where it might have been brought," given the federal district courts the absolutely revolutionary power to **force** a plaintiff to try his case in **any** district in the United States without any regard to the question of whether the action could have been *properly* brought in the transferee district under the statutes defining where actions of that type "may be brought".

Unless the answer to that question is in the affirmative, this case absolutely could not be transferred to Illinois. There

is no more reason why this case could be transferred to Illinois than to **any** other district in the United States. Therefore, unless the answer to the above question is in the affirmative, the transferor court (Texas) did not have the *power* to transfer the case, and the transferee court (Illinois) did not have the *power* to accept such a transfer, and the attempted transfer was void *ab initio* and did not give the transferee court jurisdiction over the cause of action.

Section 1404(a) has two portions. One is the discretionary portion which calls upon a district court to determine whether a transfer, if made, would be for the convenience of the parties and witnesses, and in the interest of justice. The second portion is a *mandatory limitation* on the choice of districts to which such an action may be transferred. In that second portion, Congress granted the power to transfer an action to a district only "*where it might have been brought*". There is no discretion involved in that portion. It is an express limitation on the *power* to transfer. It is a clause to which it is the Court's duty to give effect under the aforementioned ruling of this Court in the *Menasche* case, 348 U. S. 528, *supra*.

It begs the question, and is misleading, to argue, as has been done by counsel for the Petitioner (pages 10 and 11), that the plaintiffs *could* have "brought" (improperly) the action in Illinois and, then, the defendants *could* have come in and waived venue and answered generally and, therefore, Illinois qualifies under the statute. If that is true, **any** other district would qualify. This is not a "waiver of venue" case. In those cases, either both parties stipulate to try a case in what would otherwise be an improper district, or the plaintiff files suit in an improper district (and thereby consents to it), and the defendant then comes in and waives venue. In either of those events, *both* parties have *consented* to try the case in what would otherwise be

an improper district. That is not the case here. In this case the defendant is attempting to **force** the plaintiff to try a case in an improper district. There is no more reason why a plaintiff should be subject to being **forced** into an improper district than a defendant should be subject to being so **forced**. If Congress had meant to make such a revolutionary change in our laws, it would have very carefully and emphatically spelled it out. It did not so spell it out. On the contrary, it incorporated an express limitation as to the districts to which an action could be transferred.

The present case involves a particular federal statute (the patent statute, Sec. 1400(b), Title 28 USC'A) which specifically states in which federal district an action of this nature "may be brought." The transferor court (where the plaintiff brought the action, and where a trial date had already been set) fully qualified as a proper district under that statute. The transferee district (Illinois) does not so qualify. If the present plaintiffs may be **forced**, by the venue-hunting defendants' motion to transfer, then they could just as well have been forced to try this action in **any** other district in the United States. There is no more reason why Illinois would qualify in this case as a district "*where the action might have been brought*" (which is laid down as a requirement for transfer under Sec. 1404(a), Title 28 USC) than any of the other federal districts in the United States. Certainly, the Court of Appeals for the Seventh Circuit was entirely correct in holding that Illinois was not a district which qualified as a transferee district. A contrary decision would open wide the door for venue shopping defendants to transfer cases into **any** district in the United States, without regard to whether or not the action could properly have been brought in the transferee district.

It is inconceivable that Congress would have introduced

such a revolutionary concept into our laws without having very carefully spelled it out. Congress did not do so. In fact, rather than spelling out any such broad, revolutionary power, Congress *limited* the power to select a transferee district by saying that a transfer could be made to a district "where it might have been brought". Certainly, Congress meant that section to be read with the other sections (such as the patent statute, Sec. 1400(b), Title 28 USC, involved herein) which specifically spell out where an action "may be brought".

It is misleading to contend, as counsel for Petitioner have done in their brief (page 8), that "Certainly Congress did not intend to *remove* from individual defendants their right to transfer to a jurisdiction convenient to them * * *." Defendants never had any such right, prior to the adoption of Sec. 1404(a), unless there were two *proper* forums. Sec. 1404(a) has not given defendants any such new right.

PETITIONER, HIMSELF, ADMITS THAT A HOLDING THAT THE PRESENT CASE MAY BE TRANSFERRED TO ILLINOIS DOES GREAT VIOLENCE TO THE ESTABLISHED RULES OF STATUTORY CONSTRUCTION.

Petitioner, himself, in his opinion below, admits that holding that the present case may be transferred to the Illinois district does great violence to the established rules of statutory construction. Thus, in his opinion, petitioner stated as follows (R. 25):

> "Gentlemen, personally I am of the opinion that the dissent in *Paramount against Rodney* [186 F. 2d 111, 116] is supported by the greater weight of reason and logic and this Court, if I were to rely on my own personal inclination, should retransfer this case to Texas.
>
> "Those cases supporting transfer to this district,

I think, do great violence to the established rules of statutory construction.

"They seem to create a doctrine of retroactive waiver in order to reach the conclusion that the action might have been brought."

This statement of the Petitioner is sufficient answer, in and of itself, to the contrary contentions set forth by counsel for Petitioner in the "Brief of Petitioner" in the strained "literary autopsy" which they decry but perform in their brief (page 6). To adopt the theory of counsel for Petitioner that "might have been brought" in Sec. 1404(a) means any district in which the action might have been "commenced" by mere filing of the complaint, entirely emasculates this portion of the statute. An action may be "commenced" (even if improperly) by the filing of a complaint in *any* district. Therefore, if counsel's contention is correct, the section would be complete without the words "might have been brought". Hence, those words would be rendered meaningless. That is entirely contrary to the law as it has been laid down by this Court, namely, that it is the Court's *duty*

> "to give effect to *every clause and word* of a statute," *United States* v. *Menasche*, 348 U. S. 528, 538, 539, *supra*.

CONTRARY TO THE CONTENTIONS OF PETITIONER'S COUNSEL THE COURTS OF APPEALS FOR THE FIRST, SECOND AND THIRD CIRCUITS HAVE NOT ADOPTED PETITIONER'S INTERPRETATION OF SEC. 1404(a).

At page 9 of the "Brief of Petitioner", counsel for the petitioner states that the "Petitioner's interpretation of Section 1404(a) has been adopted by the United States Courts of Appeals for the First, Second, Third, and Fifth Circuits." They then cite *Ex parte Blaski*, 245 F. 2d 737 (CCA-5); *Torres* v. *Walsh*, 221 F. 2d 319 (CCA-2); *In re*

Josephson, 218 F. 2d 174 (CCA-1); *Anthony* v. *Kaufman*, 193 F. 2d 85 (CCA-2); and *Paramount Pictures, Inc.* v. *Rodney*, 186 F. 2d 111 (CCA-3), as supporting this contention. With the exception, of course, of the decision of the Court of Appeals for the Fifth Circuit in this same case (*Ex parte Blaski*, 245 F. 2d 737, *supra*), *none* of the above mentioned cases have *adopted* the Petitioner's interpretation of Sec. 1404(a). In all of the other above cited cases except *Torres* v. *Walsh*, one or more of the defendants could have been sued in the district to which the action was transferred. Hence, the action "might have been" properly "brought" in such district. The *Torres* v. *Walsh* case was an admiralty case, and the facts as stated by the Court of Appeals in its opinion, showed that the vessel involved had been repeatedly in the territorial waters of Puerto Rico (the transferee district) and, therefore, the plaintiff could have properly brought the action in Puerto Rico if he had so desired. These differences between those four cases and the instant case was specifically recognized and commented upon by the Court of Appeals for the Seventh Circuit in its opinion below (R. 41).

CONTRARY TO THE CONTENTIONS OF PETITIONER'S COUNSEL THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT DID NOT PREVIOUSLY ADOPT THE PETITIONER'S INTERPRETATION OF SECTION 1404(a).

Counsel for the Petitioner then states (page 9) that Petitioner's interpretation "was, in effect, adopted by the United States Court of Appeals for the Seventh Circuit in *General Casualty Co.* v. *Grubb*, 253 F. 2d 51." This is a misleading statement. In the *General Casualty Co.* case, the action could have been properly brought against one of the defendants (the driver of the car) in the transferee district (Oklahoma) so that it "might have been brought" in Oklahoma. The Court of Appeals for the Seventh Circuit in its decision on the case stated (page 53):

"* * * we are *appraising discretion* exercised under Sec. 1404 by the district court and all we can do is determine whether the respondent Judge abused it while at the same time, guarding against substituting of our discretion for his."

The United States Court of Appeals for the Seventh Circuit in its opinion below in the present case specifically stated (R. 45) that the question of *power* to transfer was *not* decided in the *General Casualty Co.* case and that the decision in that case was solely on the issue of the district court's discretion.

CONTRARY TO THE CONTENTIONS OF PETITIONER'S COUNSEL OTHER COURTS OF APPEALS HAVE "ADOPTED" THE SAME INTERPRETATION OF SECTION 1404(a) AS HAS THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THIS CASE.

After having made the last two mentioned statements, counsel for the Petitioner at page 9 of the "Brief of Petitioner" states:

"Only in the instant case has a United States Court of Appeals adopted the opposite interpretation * * *."

This is also in error. Under the loose meaning of the word "adopted" as that word was used in counsel's other two above-mentioned statements, there can be no question but what the Courts of Appeals in the following cases "adopted" the opposite interpretation:

Shapiro v. *Bonanza Hotel Co.* (CCA-9), 185 F. 2d 777, 780;

Foster-Milburn Co. v. *Knight* (CCA-2), 181 F. 2d 949, 952, 953.

Chicago, R. I. & P. R. Co. v. *Igoe* (CCA-7), 212 F. 2d 378, 379; and

Blackmar v. *Guerre, et al.* (CCA-5), 190 F. 2d 427.

In the above-mentioned *Shapiro* case (185 F. 2d 777), the plaintiff had brought a motion to transfer under Sec. 1404(a). In ruling against the plaintiff, the Court of Appeals for the Ninth Circuit stated as follows at page 780:

> "We adhere to the view that the use of the word 'brought' *presupposes* jurisdiction over the defendant which is to be obtained *only* by and through conformance with the requirement of Rule 4(f)."

In the *Foster-Milburn Co.* case (181 F. 2d 949), the United States Court of Appeals for the Second Circuit overruled the district court's allowance of a motion brought by the plaintiff to transfer an action from New York to California. The decision of the Court of Appeals in that case was on the basis (pages 952, 953) that Rule 3 of the Federal Rules of Civil Procedure

> "does not make the filing of a complaint the equivalent of 'bringing an action' under Sec. 1404(a)",

and that

> "The revisers say that Sec. 1404(a) 'was drafted in accordance with the doctrine of *forum non conveniens,*' and that the doctrine *always 'presupposes at least two forums in which the defendant is amenable to process'.*"

In the *Chicago, R. I. & P. R.* case (212 F. 2d 378), the United States Court of Appeals for the Seventh Circuit on a petition for writ of mandamus remanded the case back to the district court with directions to further consider the matter. In that case the respondent had refused to transfer an action to the Southern District of Iowa. In a footnote in its opinion, the Court stated (page 379) with respect to Sec. 1404(a) that

> "this section *presupposes two jurisdictions in which venue may be laid.*"

In the *Blackmar* case (190 F. 2d 427), even the United States Court of Appeals for the Fifth Circuit (which held to the contrary in the present case) stated at page 429 as follows:

> "Transfer under those sections [1404(a) and 1406(a)] is *limited to districts where the suit could be originally brought*".

In its opinion in this case, that Court specifically refused to follow that statement, stating that the statement was unnecessary to the decision (R. 11).

DISTRICT COURT DECISIONS IN FIVE DIFFERENT CIRCUITS SUPPORT THE COURT OF APPEALS' DECISION BELOW.

District court decisions in five different circuits support the decision of the United States Court of Appeals for the Seventh Circuit in this case, and are directly in conflict with the decision of Petitioner. These decisions were handed down in the following cases:

General Electric Co. v. *Central Transit Warehouse Co., et al.* (W. D. Mo. W. D.), 127 F. Supp. 817;

Hampton Theatre, Inc. v. *Paramount Film Distributing Corporation, et al.* (D. C. D. C.), 90 F. Supp. 645;

Johnson v. *Harris* (D. C. E. D. Tenn. S. D.), 112 F. Supp. 338;

Sheridan et al. v. *Pan-American Refining Corp., et al.* (D. C. S. D. N. Y.), 123 F. Supp. 81; and

Felchlin v. *American Smelting & Refining Company* (D. C. S. D. Calif. N. D.), 136 F. Supp. 577.

That these cases supported the present respondents was specifically recognized (R. 11) by the United States Court of Appeals for the Fifth Circuit in its earlier decision in connection with the instant case.

In the above mentioned case of *General Electric Co.* v. *Central Transit Warehouse Co., et al.*, 127 F. Supp. 817, Judge Whittaker (now a Justice of this Court) agreed with the dissenting members in the aforementioned *Paramount Pictures* case and in a carefully reasoned and entirely logical opinion stated in part as follows at pages 825, 826 and 827 (emphasis the Court's):

> "We recognize of course, that venue can be waived. So can jurisdiction over the person be waived. But does such a waiver of either or both—made *after* an action has been 'commenced' (by the mere filing of a complaint with the clerk *in any district*, see Fed. Rules Civ. Proc. Rule 3, 28 U. S. C. A.)—establish that the action 'might have been brought' there, in the sense of that phrase as used in Section 1404(a), Title 28 U. S. C. A.? If it does, what, if any, meaning is left to the phrase 'where it might have been brought', as adopted by Congress and used in the statute? Would not such construction permit transfer of the action to *any district desired by the moving defendants*, though they, or some of them, could not have been served with process there, and no statutory venue existed there and the action could not have been *maintained* there, without their intentional waiver of venue and entry of general appearance? I think no such treatment can be given to that phrase in the statute. It, says Judge Learned Hand, 'presupposes at least two forums in which the defendant is amenable to process.' *Foster-Milburn Co.* v. *Knight*, 2 Cir., 181 F. 2d 949, 952.
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> . . . . . .
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> "We adhere to our original conclusion that a district court is without power to transfer a cause, under Section 1404(a), Title 28 U. S. C. A., to a district without statutory venue and wherein service of process could not have been had and involuntary personal jurisdiction acquired, because, under these circumstances, the action could not have been 'brought' in that district."

It is respectfully submitted that, as the Court of Appeals below stated in its opinion (R. 42), the reasoning and logic of Judge Whittaker in the last mentioned case is unassailable.

CONCLUSION.

It is respectfully submitted that for the reasons stated, and under the authorities cited, the decision of the United States Court of Appeals for the Seventh Circuit herein is entirely correct and should be affirmed by this Court.

Respectfully submitted,

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